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SUPREME COURT, U.S.

Nos. 99-1388, 99-1389

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION, *et al.*,

Petitioners,

-and-

SALT RIVER VALLEY WATER USERS' ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENTS THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE AND THE YAVAPAI-APACHE NATION

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INTRODUCTION

Respondents are the San Carlos Apache Tribe, the Tonto Apache Tribe and the Yavapai-Apache Nation, all federally recognized Indian tribes located on federal reservations in Arizona (herein the "Apache Tribes").[1] The Apache Tribes' Brief in Opposition responds to the Petitions filed by Phelps Dodge and Salt River Project.[2]

The Respondents Apache Tribes were before this Court in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (herein "*San Carlos*"). Seventeen years later, not a single water right has been adjudicated in the Arizona stream adjudication.[3]

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1. The law firm of Sparks, Tehan and Ryley, P.C., undersigned counsel has represented the Apache Tribes since 1974 in these matters and was designated by the Arizona Supreme Court as lead counsel to represent Arizona Indian tribes in *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (herein *"Gila River III"*). *See also In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442 (1992) (*"Gila River I"*) (Interlocutory Issue 1) (trial court procedures approved, including service by mail); and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (1993) (*"Gila River II"*) (Interlocutory Issue 2) (the "subflow" issue, remanded to trial court with second decision by the Arizona Supreme Court now pending).

2. *See* Petitions for Writ of Certiorari filed by, *Phelps Dodge Corporation, et al.* (herein "Phelps Dodge") *v. United States, et al.*, No. 99-1388; *and Salt River Valley Water Users' Association, et al.* (herein "Salt River Project") *v. United States, et al.*, No. 99-1389. The Phelps Dodge and Salt River Project petitions seek review by this Court of Issue 4 decided by the Arizona Supreme Court in *Gila River III*, *i.e.*, that federal reserved rights extend to groundwater to the extent necessary to fulfill the purposes of a reservation.

3. Moreover, there has been no adjudication of any federal or state water rights in Arizona since the first general stream adjudication proceeding was initiated in 1974. *See* "Phelps Dodge Petition" at p. 5: "The magnitude of this case and the significance of the issues it raises have resulted in many years of litigation without any final adjudication of specific water rights."

The Apache Tribes appeared and have faithfully participated in the Arizona proceedings. *Id.* at 545 n.17. As instructed by this Court in *San Carlos*, the Arizona courts have honored the "solemn obligation to follow federal law." *Id.* at 571.

Petitioners complain here that the Supreme Court of Arizona has applied federal law in a preliminary decision that Indian reservations may have a reserved right to groundwater where the trial court finds that surface water is inadequate to accomplish the purposes for which the reservation was established. They argue that state law should have been adopted as the federal rule.

Arizona's groundwater law defies hydrological reality. *See United States v. J. Ed Smith*, 625 F.2d 278, 280 (9th Cir. 1980) at n.3. It is based upon an "artifice . . . that rests on a hydrologic misconception. 175 Ariz. at 389, 857 P.2d at 1243." *Gila River III* at 743. The Arizona Supreme Court observed that "conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface water supplies." *Id.* at 744. Arizona has not. *See also Gila River II*, 857 P.2d at 1240.

Petitioners desire to apply this antiquated "political" hydrology to water rights for federal reservations. *Gila River III* at 747.

The Arizona Supreme Court recognized that some Indian reservations in Arizona "depend for present and future survival substantially or entirely upon pumping of underground water." *Gila River III* at 746. It has seen rivers pumped dry and Indian reservations "entirely dewatered" by off-reservation pumping under Arizona's "reasonable use" doctrine. *Id.* at 748.

In *San Carlos*, the Court cautioned that:

> . . . any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate

> with the powerful federal interest in safeguarding those rights from state encroachment.

San Carlos at 571.

The Arizona Supreme Court reviewed state law and the history of the depletion of flowing streams and groundwater in Arizona, and determined that State law is inadequate to protect federal rights where groundwater is necessary to fulfill the purposes for which federal reservations were established. This Court honors the decisions of the States' highest court when interpreting state law. *Johnson v. Frankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997); *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978); and *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967).

The Arizona Supreme Court cited the reasoning of this Court in *Arizona v. California* in finding a reserved right to groundwater where this Court declared it is:

> "impossible to believe" that those who created the Colorado River Indian Reservation "were unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona v. California*, 373 U.S. at 599. The reservations considered in those cases depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for

> habitation without reserving the water necessary to sustain life.

Gila River III at 746.

The Arizona decision is necessarily "a preliminary judgment on the question of Indian water rights." *San Carlos* at 569.

Observing the Court's reasoning in *United States v. New Mexico*, the Arizona court found a reserved right to groundwater could only be found where other waters are inadequate to accomplish the purpose of a reservation. "To determine the purpose of a reservation and to determine the water necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *United States v. New Mexico*, 438 U.S. at 700. *Gila River III* at 748.

Gila River III is abstract:

> In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

Gila River III at 705.[4]

Eventually, after a trial on the merits concerning a specific reservation, these intimately related federal questions will be decided in a factual setting and reviewed by the Arizona Supreme Court. A "final judgment" has long been the standard of the Court in these cases. If Petitioners can show specific harm in violation of federal law under a final judgment at that time, this Court would have jurisdiction under 28 U.S.C. § 1257(a).

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4. In *United States v. Cappaert*, a standard was crafted that protected the purpose for which Devil's Hole National Monument was established after extensive fact findings to determine the measures necessary to protect the federal purpose. *See also San Carlos* at 571.

At this point in the Arizona proceedings, *Gila River III* merely assures that state groundwater pumpers are on notice[5] and are participating in the adjudication as is necessary to preserve the comprehensive requirements of the McCarran Amendment[6] and to avoid piece-meal adjudication.[7] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) (herein "Colorado River"). *Gila River I.*

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation ("Apache Tribes") are parties in "In Re The General Adjudication Of All Rights To Use Water In The Gila River System And Source," Consolidated Case Nos. W1-4.

The Apache Tribes are federally recognized pursuant to the Apache Treaty, July 1, 1852, 10 Stat. 979, and Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* The Reservations of the Tribes are all within their original aboriginal homelands under the Apache Treaty. *See United States v. Santa Fe Pacific Railroad Co.*, 315 U.S. 339 (1941), *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983). *In the Treaty of Guadalupe Hidalgo*, 9 Stat. 922, Feb. 2, 1848, the Apache Tribes were to be free and secure in their tribal homelands. *See id.* Articles VIII, IX, XI, XXII.2.

A. The San Carlos Apache Tribe.

The San Carlos Apache Reservation (herein "the Reservation") was established by Executive Orders of President Grant on November 9, 1871, and December 14, 1872. There are approximately two thousand eight hundred and fifty-five (2,855) square miles within the current Reservation (1,827,200

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5. *See Gila River I, Gila River III* at 748.

6. The McCarran Amendment, 43 U.S.C. § 666 (herein "McCarran Amendment"), *Arizona v. San Carlos, id.* at 565 n.16, 569, 570; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976).

7. *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983).

acres). The United States holds title to the lands within the Reservation in trust for the benefit of the San Carlos Apache Tribe. The Reservation is in Gila, Graham, and Pinal Counties in eastern Arizona. Tribal membership is approximately 12,000.

The Reservation is in the Upper Salt River, the Upper Gila River, and the San Pedro River "subwatersheds" of the Arizona General Stream Adjudication W-1 through W-4. Most major surface streams in central Arizona run through, border, arise on, or are tributary to surface and underground water on the Reservation, including without limitation, the Black River, Salt River, the Gila River, Ash Creek, Willow Creek, Eagle Creek, Bonita Creek, Deer Creek, Salt Creek, and San Pedro River.

The San Carlos Apache Reservation is surrounded on three sides by federal land administered by the National Forest and Bureau of Land Management. The north boundary of the San Carlos Apache Reservation is the south boundary of the White Mountain Apache Reservation. The San Carlos and White Mountain Apache Reservations were once one, but later divided along the Black and Salt Rivers into the two separate Reservations which exist today.

The Gila River is the only stream with a Decree (Globe Equity No. 59) which purports to adjudicate certain rights on the San Carlos Reservation. That Decree provides only 6,000 acre-feet of water for 1,000 acres of irrigation along the Gila River in the San Carlos Apache Reservation, with a priority date of 1846. All residential, governmental, and commercial water use on the Reservation is from underground wells. There is no present substantial surface water use or development on the Reservation, with the exception of stockwatering, wildlife, and recreation.

B. Tonto Apache Tribe.

The Tonto Apache Tribe is a federally recognized Indian Tribe pursuant to P.L. 92-470, 86 Stat. 783, October 6, 1972. The Tonto Apache Tribe consists of over 100 members on the 85 acre Tonto Reservation located south of Payson, Arizona in Gila County. One-half of the Reservation is in the upper Salt

sub-watershed and one-half of the Reservation is in the upper east Verde sub-watershed of the Arizona General Stream Adjudication W-1 through W-4.

The Tonto Apache Reservation is surrounded on three sides by the Tonto National Forest and on the north by the Town of Payson. The Reservation has no surface water supply. The Tribe relies upon groundwater from a well which was developed by the United States to serve the Reservation. The parcel of land where the Tribal well is located was later traded into private ownership by the National Forest. To protect the Tribal water supply, federal deed restrictions were placed on the patent of property by the United States which prohibits the private owner from polluting the groundwater and from withdrawing groundwater from the land around the well site. Nearby pumping has reduced the production of the federal well which is now inadequate to meet the present needs of the Tonto Apache Reservation.

C. Yavapai-Apache Nation.

A Reservation was established by Executive Order on October 3, 1871, ten miles on both sides of the Verde River for forty-five miles, which Reservation was to serve as a permanent tribal homeland for both Tribes "as long as the grass shall grow and the stream shall flow." The Yavapai-Apache Nation has approximately 2000 members.

In the late winter of 1875, both Tribes were forcibly removed from the Verde Valley In "Trail of Tears." On April 23, 1875, the Reservation was terminated by Executive Order. Tribal members were forced through the snow nearly 180 miles to the San Carlos Reservation where they were incarcerated. Many men, women, and children perished on the way. Some escaped on route and returned to the Verde Valley. The remaining survivors walked back from San Carlos to the Verde Valley beginning In 1886. Many arrived after the start of construction of Roosevelt Dam at the confluence of the Salt River and Tonto Creeks In 1909. They were permitted to leave San Carlos to work on the Dam, and then returned home to the Verde Valley.

When the Tribes returned from San Carlos, either by escape or permission, they found their homes, farms and communities occupied or dominated by non-Indians. Nevertheless, the Tribal members persisted and established new camp and farm sites. Over a period of years a number of parcels of land occupied by Tribal members were acquired in trust either by the United States by statute, gift or exchange.

The Yavapai-Apache Reservation consists of several parcels of land totaling approximately 653 acres located in the Valley of the Verde River, Yavapai County, Arizona. Reservation parcels of land are located near Clarkdale, near Camp Verde, near Middle Verde, near Rimrock and at the I-17 interchange for the Montezuma Castle National Monument. Each parcel has a different acquisition date ranging from 1909 to 1974.

The Yavapai-Apache Nation has approximately 2000 members. The Nation relies upon surface water from the Verde River for irrigation. It is totally dependent upon groundwater for all domestic, municipal and commercial purposes. Both surface water and groundwater are declining in the Verde Valley as a direct result of groundwater pumping in the Big Chino Valley, the Little Chino Valley near Prescott, Arizona, and pumping in the Verde Valley.

STATEMENT OF THE CASE

A. The Gila River Adjudication.

"The Gila River System is over appropriated; the supply of water presently available and which seems likely to be available in the future is not sufficient to satisfy the needs and demands of existing projects." *Arizona v. California*, Report of the Special Master, December 5, 1960, p. 325; *see also Gila River I* at 232 and *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996).

B. The Proceedings Below.

The Gila River stream adjudication began as an administrative proceeding in 1974 when Salt River Project filed a petition with the Arizona Land Department to determine the conflicting rights in the Salt River above Granite Reef Dam. In

its present form the Gila River adjudication is a consolidated effort to achieve "a comprehensive general stream adjudication to determine 'the nature, extent and relative priority' of the water rights of all who use the water of a 'river system and source' . . ." with respect to waters within the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz and San Pedro watersheds. *Gila River III* at 742.

Gila River III is the third case decided by the Arizona Supreme Court in Arizona's general stream adjudications within the context of six special interlocutory issues certified for review by the Arizona Supreme Court.[8]

The Petitions filed by Phelps Dodge Corporation and the Salt River Project have requested the Court to review only Issue 4 decided in *Gila River III*.[9] The Apache Tribes allege that Petitioners have attempted to bifurcate Issues 4 and 5 for purposes of this Court's review, because the *Gila River III* court's holding with respect to Issue 5 "fits four square" with the Court's decision in *Cappaert* and provides the logic and rationale for the *Gila River III* court's holding with respect to Issue 4.

SUMMARY OF ARGUMENT

Gila River III seeks to implement this Court's decision in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545

8. *See* Appendix to Petitions, Appendix B, pp. B1 and B2, the Arizona Supreme Court's "Orders Concerning Petitions for Interlocutory Review" filed December 11, 1990, which designated the six Interlocutory Issues for review by the Arizona Supreme Court, including Interlocutory Issues 4 and 5 decided in *Gila River III*; and the Arizona Supreme Court's "Special Procedural Order Providing for Interlocutory Appeals and Certifications" dated September 26, 1989, Phelps Dodge Petition, Appendix C.

9. Issue 4 as stated by the Arizona Supreme Court is "Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law?" Issue 4 is clearly a federal question. Issue 5 as stated by the Arizona Supreme Court is "Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights?" *See Gila River III* at 741. Issue 5 is clearly an interrelated federal question with Issue 4.

(1983) (herein "*San Carlos*"), wherein this Court decided in part that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights and applies to all states, thus providing Arizona courts with the jurisdiction to adjudicate federal reserved water rights in Arizona's general stream adjudications, and decide federal reserved water right questions, such as, the Arizona Supreme Court decided in *Gila River III*.

The Court also held in *San Carlos* that state courts have a solemn obligation to follow federal law, and that there is a powerful federal interest in safeguarding federal reserved water rights from state encroachment. *San Carlos*, 463 U.S. at 571. *See also United States v. Superior Court*, 697 P.2d 658 (1985), which upheld the jurisdiction of Arizona courts to adjudicate federal rights in the general stream adjudication, and also upheld the constitutionality of Arizona's general stream adjudication procedures.[10]

The Apache Tribes respectfully submit that this Court lacks appellate jurisdiction to grant certiorari in this matter, because the Arizona Supreme Court's decision in *Gila River III* is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a).[11] *Gila River III* is interlocutory; and related federal questions must

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10. For a history of Arizona's general stream adjudications, *see San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (1999), a special action filed in the Arizona Supreme Court by the Apache Tribes, which held multiple legislative provisions enacted in 1995 relating to Arizona's general stream adjudications unconstitutional. This unconstitutional legislation delayed this adjudication four years.

11. *See Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 122, 123-124, 127 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (herein "*Cox Broadcasting*"); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); and *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

be decided in future trial court proceedings before it is determined that any federal reservation in Arizona has a reserved right to groundwater (*Gila River III* at 748).[12]

These federal questions include, but are not limited to, a trial court's determination that the purposes of a particular federal reservation entitles that reservation to groundwater; and that such reservation requires groundwater to satisfy its quantified federal reserved water rights. *Gila River III* at 750.

Until a trial court adjudicates all of these federal questions relating to whether a particular federal reservation has a federal reserved right to groundwater, and the Arizona Supreme Court reviews the decision, there is no final judgment with respect to Issue 4 which might be reviewable by this Court under 28 U.S.C. § 1257(a).

Assuming *arguendo* that *Gila River III* is a final judgment, the Court should refuse to exercise its discretion to accept jurisdiction because the decision in *Gila River III* is abstract in nature.[13] *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947). *See* Part VI herein.

The Arizona Supreme Court decided both Issues 4 and 5 in the affirmative, holding that: (1) federal reserved rights extend to groundwater to the extent necessary to accomplish the purpose

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12. The Court has held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent necessary to accomplish the purpose of that reservation. *Winters v. United States*, 207 U.S. 564 (1908) ("*Winters*"); *Arizona v. California*, 373 U.S. 546 (1963); and *Cappaert v. United States*, 426 U.S. 128 (1976) ("*Cappaert*"). This doctrine of federally reserved water rights has been extended to surface water. This Court has not yet decided if federally reserved water rights extend to groundwater.

13. In *Gila River III* at 748, the court stated: "We decide this issue [Issue 4] in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater."

of a reservation (Issue 4); and (2) holders of federal reserved rights to groundwater have the right to protect their groundwater from depletion by state groundwater pumpers to the extent necessary to accomplish the purpose of a reservation (Issue 5). It held that for the purpose of the federal reserved rights doctrine, it makes no difference whether water ". . . runs above or below the ground." *Gila River III* at 747.

Issues 4 and 5 were decided in the abstract because there has been no adjudication of the water rights of any federal reservation in Arizona. Issues 4 and 5 are inextricably related. *Gila River III* at 748, citing *Cappaert.*[14]

Presently there is no case or controversy. Petitioners can allege no present harm or constraint on their rights. Until a trial court decides that a particular reservation has a federal reserved right to groundwater, and the quantity and priority[15] of that right, state groundwater pumpers will continue to encroach upon and deplete[16] federal reserved groundwater

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14. In *Cappaert*, at 145, this Court held that federal reserved surface water rights are not dependent upon state law or state procedures, and that they are therefore protected from depletion from groundwater pumping authorized under state law.

15. The trial court must determine the priority date of the reservation's right to groundwater, Salt River Project Petition, another related federal question, since this issue was not explicitly addressed in *Gila River III., id.* at 20.

16. The Arizona Supreme Court noted in *Gila River III* that some Indian reservations have already been "dewatered" by "off-reservation" pumping. *Gila River III* at 748. The 26 year delay of the adjudication of water rights in the Arizona general stream adjudications has resulted in the permanent depletion of the federal reserved water supplies for some Indian reservations in Arizona. Interlocutory review by this Court now of the *Gila River III* decision, would only constitute further intolerable delay. *See United States v. Gila Valley Irrigation District*, 959 F.2d 242 (1992) where the San Carlos Apache Tribe attempted to protect its surface rights to the Gila River from encroachment by upstream groundwater pumpers.

as they have in the past, despite the decision in *Gila River III*.[17]

The Court should therefore deny the Petitions of Phelps Dodge and Salt River Project.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION BECAUSE THE DECISION IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(a).

A. The Arizona Supreme Court's Decision in *Gila River III* is Not a Final Judgment Under 28 U.S.C. § 1257(a).

The Petitioners have failed to carry their burden of affirmatively establishing that the decision in *Gila River III* is a "final judgment" within the meaning of 28 U.S.C. § 1257(a). *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948). The Court's appellate jurisdiction to review a state-court decision under 28 U.S.C. § 1257(a) is limited to a "final judgment" rendered by the highest court of the state which rendered the decision. *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-477 (1975) (herein "*Cox*").

The "final judgment" rule has been interpreted by this Court "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In *Radio Station WOW, supra*, this Court provided the rationale for the "final judgment" rule:

> This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where

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17. In *Gila River III* at 749-750, the Arizona Supreme Court held: "We similarly hold that once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right."

> intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments.

Radio Station WOW at 124.

The Court in *Cox* recognized four categories of cases that constitute exceptions to the final judgment rule where state-court judgments are treated as final even though there are further proceedings to take place. None of these four categories apply, however, where there are other *federal questions* that must be decided in the further proceedings to take place. *Cox* at 477. This Court in *Cox* stated:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid. "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc. v. Johnson, supra* at 124, as well as precipitate interference with state litigation.

Cox at 477.

Phelps Dodge argues that only the fourth category of exceptions to the "final judgment" rule applies in this matter.[18] This Court has ruled that there may be an exception to the "final judgment" rule where the federal question has been finally decided by the state court, but: (1) there are further proceedings pending in which the party seeking review might prevail on the

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18. Salt River Project did not argue that *Gila River III* falls within any of the four categories of exceptions to the "final judgment" rule. Respondents therefore presume that Salt River Project relies on the arguments made by Phelps Dodge.

merits on non-federal grounds, thus preventing review of the federal question by this Court; and (2) where reversal by this Court on the federal question would be preclusive of any further litigation in state court. The Court has held that it will only accept review in the forth category, if failure to do so would seriously erode federal policy. *Cox* at 482-483.

Here federal policy supports denial of Petitioners' Writs. *Gila River III* is a preliminary decision to guide the trial court. In Contested Case W1-203, proceeding below, the rights of the Gila River Reservation will be determined. The Trial Court will examine nearly a half million pages, executive orders, statutes, decrees, hydrologic reports to determine, in the first instance, whether that Reservation has a reserved water right; and if so, whether surface water is adequate to satisfy it; and if not, how much groundwater would be necessary to satisfy the right; and if so, to what extent, if any, pumping under state law would be limited to protect the federal purposes of that Reservation.

The same process is necessary for each federal reservation. It will be decades at the present pace before a final judgment in a factual setting will join the federal issues in a factual context. Meanwhile, *Gila River III* does not preclude Petitioners from exercising their alleged state rights to pump although they are on notice.

This fourth category of cases does not apply to *Gila River III* because there are other critically related federal questions that still must be decided in further trial court proceedings. The cases cited by Phelps Dodge that *Gila River III* is a final judgment, *Cox, supra*, and *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), are therefore inapposite.

Moreover, *Gila River III* could not fall within the fourth category of cases because: (1) it is impossible that Petitioners could prevail on the merits on non-federal grounds, since they could only prevail on the merits if all of the related federal questions discussed herein were decided in their favor; and (2)

refusal by this Court to accept review now will not erode federal policy.

B. The Decision Is Interlocutory.

The Arizona Supreme Court has stated expressly that *Gila River III* is interlocutory. As discussed above, future trial court proceedings must decide dependent and critically related federal questions[19] *Gila River III* therefore does not fall within any of the four exceptions identified in *Cox*.

With respect to Issue 4, the federal question as to whether any particular federal reservation, Indian or otherwise, has a reserved right to groundwater, includes the related and dependent federal questions regarding the purposes of a reservation, and the quantification of that reservation's right to federally reserved waters:

> A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis. *See United States v. New Mexico*, 438 U.S. at 700.

Gila River III at 748.

Under *Gila River III*, the trial court will determine the purposes of a reservation, and quantify and prioritize each of a reservation's federal reserved water rights. Many reservations were established under multiple treaties, execute orders and

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19. *See Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 122, 123-124, 127 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (herein "*Cox Broadcasting*"); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); and *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

parcels. Petitioners below have urged that each addition carries a separate federal purpose.

With respect to Issue 5, the *Gila River III* court decided that no federal reserved right holder is entitled to injunctive relief until after it establishes a reserved right to groundwater (Issue 4), and then only to the extent necessary to preserve the reservation's groundwater rights (Issue 5).

> In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

Gila River III at 750.

This will require a complex evaluation of the water supply, both surface and groundwater. The Court will determine the water supply which was available at the time each reservation parcel was established. It will evaluate the present supply to determine whether surface water is adequate. If not, it will evaluate complex questions related to the groundwater supply under or near the reservation. At that time, the trial court will structure the rules necessary to protect the federal purposes for the reservation. As in *Cappaert*, pumping off the reservation will be limited under *Gila River III* only to the extent required to protect the federal purpose.

A related but separate federal question included within Issue 5, not decided, but discussed in *Gila River III*, is whether the Arizona Supreme Court's definition of "subflow" (Interlocutory Issue No. 2 now pending before the Arizona Supreme Court for decision), will be broad enough to protect the surface water rights of federal reservations from depletion by pumping. *Gila River III* at 749.[20] Respondents allege that the regulation of

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20. In *In re the General Adjudication of All Rights To Use Water in the Gila River Systems and Source*, 857 P.2d 1236 (1993), (Cont'd)

state groundwater pumping within the category of "subflow," as surface flow under the law of prior appropriation, will not be adequate to protect federal reserved surface water rights. State groundwater pumping of "subflow" to be defined by the Arizona Supreme Court in the pending Interlocutory Issue No. 2 Issue, will be treated as the appropriation of surface flow and will likely be assigned a priority date and diversion rate, and regulated accordingly under the doctrine of prior appropriation.

These critical federal questions demonstrate that *Gila River III* is not a final judgment under category 4 of *Cox*. Moreover, that category does not apply with respect to Issue 4, because it is impossible that Petitioners could prevail on the merits on non-federal grounds. The trial court would have to rule against Petitioners on all of the related federal questions discussed herein, if they are to prevail with respect to Issue 4.

Gila River III does not erode federal policy. It is consistent with the federal reserved water rights doctrine, as clearly shown by the Arizona Supreme Court's careful application of the prior decisions of this Court, including *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); and *United States v. New Mexico*, 438 U.S. 696 (1978). The decision in *Gila River III* therefore does not erode federal policy, and would not be reviewable under the fourth category of exceptions to the "final judgment" rule, even if all other prerequisites for review were satisfied.

Interlocutory review by this Court now of *Gila River III*, violates both the substance of the "final judgment" rule, and the policies underlying such rule, because interlocutory review

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(Cont'd)

(Interlocutory Issue No. 2), the Arizona Supreme Court remanded the issue of "subflow," *i.e.*, whether a well pumping near a river depletes streamflow to the extent that it must be regulated as an appropriation of surface flow, to the trial court. The trial court on remand determined that a well pumping from the "younger alluvium" connected to a river is pumping "subflow." The trial court's decision was reviewed by the Arizona Supreme Court, and a final decision is pending.

now would substantially and needlessly interfere with Arizona's ongoing general stream adjudications, and in particular, the Gila River Indian Community's federal reserved water rights in Arizona in W1-203. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

II. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE *GILA RIVER III* DECISION IS ABSTRACT IN NATURE.

Gila River III is abstract in nature, as a matter of substantive law. This Court should not accept jurisdiction, even if the Court determined that the decision was a final judgment. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

The *Gila River III* court explained that it was not imposing a standard upon the trial court for determining the purpose of any reservation, because such a standard is not well-suited to "abstract declaration and should instead emerge from testing in the solid. context of the facts." *Gila River III* at 748-750. Thus, the trial court in future proceedings involving the issue as to whether a particular federal reservation has a reserved right to groundwater, will be required to decide other related federal questions, including the standard for determining the purpose of any particular reservation, and if ". . . other waters are inadequate to accomplish the purpose of a reservation." *Gila River III* at 748.

The *Gila River III* court also followed this Court's holding in *United States v. New Mexico*, 438 U.S. 696 (1978) (herein "*New Mexico*"), and held that a reserved right to groundwater may only be found where "other waters" are inadequate to accomplish the purpose of a reservation. Assuming *arguendo* that the *Gila River III* decision is a final judgment, the Court should not grant review because the decision comes to this Court in a highly abstract form as acknowledged by the Arizona Supreme Court in its decision. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California*

Department of Corrections, 452 U.S. 105 (1981). It has long been this Court's practice not to decide abstract issues of law.

Petitioners present no case or controversy. The Petitioners are essentially requesting that the Court render an advisory opinion on Issue 4, one of several related federal questions in *Gila River III*. This Court should decline discretionary certiorari review in this matter, where further Arizona state court proceedings will tender the related federal questions to this Court in clean-cut and concrete form, grounded in the bedrock of facts, after they have actually been decided and applied in the adjudication of a particular federal reservation's federally reserved water rights. *Gila River III* at 748-750; *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981).

III. THE ARIZONA SUPREME COURT DECISION CONFORMS WITH THE PREVIOUS DECISIONS OF THIS COURT REGARDING FEDERAL RESERVED WATER RIGHTS.

A. The *Gila River III* Court's Holdings With Respect to Issue 4 and 5.

With respect to Issue 4, the *Gila River III* court held:

> Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation.

Gila River III at 751.

With respect to Issue 5, the *Gila River III* court held:

> Holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.

Gila River III at 751.

The *Gila River III* court specifically rejected all of the arguments that Petitioners make here that state law regarding

groundwater pumping is adequate to protect federal reserved water rights.

First, the Arizona Supreme Court stated that this Court has defined the federal reserved water rights doctrine as an exception to Congress' deference to state water law. *Gila River III* at 747. *See Cappaert*, 426 U.S. at 144 (holding that the Desert Land Act does not apply to water rights on federally reserved land. *See also United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Petitioners therefore egregiously misstate the law when they argue in their Petitions that federal reserved rights are deferential to state water law.

Second, the Arizona Supreme Court in *Gila River III* also rejected Petitioners' arguments under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), that state law is adequate to protect federal reserved water rights to groundwater, the court holding that if Arizona groundwater law applied to federal reservations, all overlying landowners would have an equal right to pump as much water as they can put to reasonable use, and all aquifers underlying federal reservations could be pumped dry by "off-reservation" pumping.

The court acknowledged in its decision that many aquifers underlying federal and Indian reservations have already been depleted by state groundwater pumpers.[21]

The *Gila River III* court correctly rejected Petitioners' argument that federal law should adopt the state rule of decision for the reason that it overlooks the fact that federal reserved water rights are by nature a federal preserve intended to continue in perpetuity, and they must fulfill the "future requirements" of

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21. The *Gila River III* court at 748 noted that "Within the Lower Gila River watershed [Gila River Indian Reservation], groundwater tables have been so lowered as to sever the connection between ground and surface water." The court also noted at p. 748 that "Some Indian reservations have been entirely "dewatered" by off-reservation pumping." citing *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 665-66 (1986).

federal and Indian reservations, citing *Winters*, *supra*, and *Arizona v. California*, *supra*:

> A theoretical equal right to pump groundwater in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumping.

Gila River III at 748.

The application of state groundwater law to federal reservations, even in a "nondiscriminatory" manner as argued by Petitioners, would nevertheless frustrate or defeat the federal purposes and objectives of federal reservations, since the groundwater underlying federal reservations would be pumped dry under the state rule of decision. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

The federal reserved water rights doctrine must therefore be applied to groundwater for all federal reservations as a matter of federal law in order to protect and safeguard federal interests. *Cappaert*, *supra*.[22]

B. The *Gila River III* Court's Decision Follows This Court's Previous Decisions Regarding Federal Reserved Water Rights and Therefore Does Not Erode Federal Policy.

The *Gila River III* court cited the holdings of this Court in both *Winters* (federal reserved rights extend to surface water) and *Cappaert* (federal reserved surface water protected from depletion by state groundwater pumping),[23] as guideposts

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22. Issues 4 and 5 are inextricably related because Issue 5 protects the groundwater underlying federal reservations from being depleted.

23. In *Cappaert*, this Court held: "Thus, since the implied-reservation-of-water is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion if of surface or groundwater." *Cappaert* at 143. The Court held that reserved surface water at Devil's Hole which was part of the Death Valley National Monument was protected from depletion by state groundwater pumping to the extent necessary to satisfy one of the purposes of the reservation which was to preserve a unique species of fish.

providing the rational for their holding that federal reserved water rights may also extend to groundwater:

> While Cappaert bears most directly upon our discussion of issue 5 in Part IV of this opinion, we find it helpful to our resolution of the present issue [Issue 4] as well. That federal reserved right law declines to differentiate surface and groundwater — that it recognizes them as integral parts of a hydrologic cycle — when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected.

Gila River III at 747.

Thus, the Arizona Supreme Court applied and followed this Court's previous decisions regarding federal reserved water rights in *Winters, Cappaert and New Mexico*. *Gila River III* is therefore consistent with the federal substantive law and policies protecting federal reserved water rights as established by this Court.

C. The Decision Is Consistent With The Decisions of Other Federal Courts.

The Decision is consistent with the decisions of all federal courts which have ruled on the federal reserved rights to groundwater. While this Court has not yet ruled that federal reserved water rights extend to groundwater, some federal courts have.

The Federal District Court in San Carlos expressly ruled on the Apache Tribes' concern that Arizona would not follow federal law concerning the reserved right to groundwater. *Matter of Determination of Conflicting Rights To The Use of Water From The Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), *rev'd on other grounds*, 668 F.2d 1093 (1982), *rev'd*, 463 U.S. 545 (1983), *vacated* 721 F.2d 1187 (1983) (action

stayed pending conclusion of state court proceeding). The Court cited *Cappaert* as the authority for its ruling:

> The Supreme Court in *Cappaert* further stated that the "United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 426 U.S. at 143, 96 S.Ct. At 2071.
>
> Thus, the State proceedings will determine federal reserved water rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law.
>
> Those rights which are state created will be determined by state law and Federal law will be applied to determine those rights which derive from Federal law.

484 F. Supp. at 784.

Thus, the U.S. District Court of Arizona held in this case that because Arizona general stream adjudications would adjudicate the federal reserved water rights of Indian tribes to both surface and groundwater, the state proceedings qualified as a McCarran Amendment proceeding.

In *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699-700 (1986), the U.S. Court of Claims expressly held that groundwater under the Gila River Indian Reservation was impliedly reserved for the Gila River Indian Community under the federal reserved rights doctrine, citing *Winters, Arizona v. California*, and *Cappaert, supra*, as authority.

In *Tweedy v. Texas Company*, 286 F. Supp. 383, 385 (Mont. 1968), the U.S. District Court of Montana acknowledged that while the *Winters* case dealt only with surface water, the same logic which led this Court in *Winters* to hold that surface waters had been reserved, would also apply to groundwater:

> The land was arid — water would make it more useful, and whether the water were found on the

> surface of the land or under it should make no difference.

In *Park Center Water District v. United States*, 781 P.2d 90, 95 (Colo. 1989), *cert. den.*, 494 U.S. 1079 (1990), the Supreme Court of Colorado assumed without deciding, that federal reserved water rights apply to groundwater in the same way as it does to surface water, citing *Cappaert*.

In *State of Nevada v. United States*, 165 F. Supp. 600 (D. Nev. 1958) the federal court ruled that the federal government had the right under the holding in *Federal Power Comm'n. v. Oregon*, 349 U.S. 435 (1955), to make full use of all underground or percolating waters developed in its own wells on federal reserved land, independent of state law or procedures, and was therefore not required to comply with state law or procedures to use its underground waters.

The Ninth Circuit in *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) also held that Federal reserved rights extend to both surface water and groundwater:

> **Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation.** *Neveda ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.*, 286 F.Supp. 383 (D. Mont. 1968).
>
> **In our view the United States may reserve not only surface water, but also underground water.**

(Emphasis added).

Petitioners' argument that this Court should treat *Gila River III* as a final judgment under the fourth category of exceptions to the "final judgment" rule under *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-477 (1975) (herein "*Cox*"), because it is inconsistent with and will erode federal policy, is therefore erroneous.

D. The Gila River III Court Correctly Decided Issue 4.

The Court has long recognized the reality that groundwater and stream flow are connected. It is not an impermissible leap of faith to find that "groundwater and groundwater" are connected. In *Arizona v. California*, all withdrawals of water in the Upper Basin, from surface flow or from wells, is counted against the Upper Basin share of the Colorado River. The Court also ruled that all "underground sources" were to be counted against New Mexico's share of the Gila River under the equitable apportionment between New Mexico and Arizona. *Arizona v. California*, 376 U.S. 340, 347, 348 (1964). New Mexico water users were enjoined by the Court from withdrawing water from underground sources in the Gila Basin in New Mexico, with certain exceptions. *Id.* at 347, 348, 349. It further ruled that under those limited exceptions, pumping could be enjoined when it "is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree." *Id.* at 350. *See also Cappaert* at 142; *Kansas v. Colorado*, 514 U.S. 673 (1995) (Post Compact pumping in Colorado has caused material depletion of usable state line flows of the Arkansas River); *Nebraska v. Wyoming and Colorado*, 515 U.S. 1 (1995) (Nebraska would be permitted to allege that increased groundwater pumping within Wyoming threatened substantial depletion of the North Platte River's natural flow.)

Issues 4 and 5 are inextricably intertwined because *Cappaert* was followed by the *Gila River III* court in its holding that federal reserved right to groundwater may be protected from depletion by state groundwater pumping. The need to protect federal groundwater from depletion, provides the logic and rationale for the *Gila River III* court's holding, that federal reserved water rights extend to groundwater to the extent necessary to accomplish the purpose of a reservation.[24]

24. The Arizona Supreme Court found that even if Arizona state law were applied in a nondiscriminatory manner among state and federal interests, groundwater underlying federal reservations could be totally depleted, as has already happened to some federal and Indian (Cont'd)

IV. CONFLICTS WITH OTHER CASES DO NOT EXIST TO PROVIDE REASON TO GRANT CERTIORARI.

There is no reason to grant certiorari under Supreme Court Rule 10.

Petitioners argue that there is a conflict between two state courts of last resort regarding the same important federal question.[25] This Court did accept jurisdiction in Wyoming in *Wyoming v. United States*, 488 U.S. 1040 (1989) (herein "*Wyoming*"), to review the federal question of the extent of Indian federal reserved water rights under the "practicably irrigable acreage" standard adopted by this Court in *Arizona v. California*, 373 U.S. 546 (1963). However, the Wyoming state court decision, *In re: the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), was clearly a final judgment within the meaning of 28 U.S.C. § 1257(a). It was not an interlocutory judgment as argued by Phelps Dodge in its Petition at p. 13 because the trial court had adjudicated all of the federal questions and the reserved water rights of the Wind River Indian Reservation.[26]

(Cont'd)
reservations in Arizona. *Gila River III* at 748. It is the federal concern and objective to protect against the depletion of the federal interest, here groundwater underlying federal reservations (Issue 5), that predetermines the federal decision that the federal reserved rights doctrine applies to groundwater (Issue 4).

25. The Petitioners cite the dissenting opinion in *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) (herein "*Clinch*"), for the proposition that there is a conflict between the Arizona and Wyoming state courts of last resort regarding whether a federal reserved right to groundwater exists.

26. This Court has held that the designation given the judgment by state practice is not controlling as to finality. *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946). However, *Gila River III* is interlocutory, because further trial court proceedings are necessary to apply the court's holding regarding Issue 4, within the context of the adjudication of a particular federal reservation where other related federal questions must also be decided.

In *Clinch*, the Montana Supreme Court upheld its prior decision in *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, et al.*, 923 P.2d 1073 (Mont. 1996), that the Montana Department of Natural Resources and Conservation has no authority to issue any water permits on the Flathead Indian Reservation until the Tribes' reserved water rights are quantified. The Montana cases do not address the issue of whether the Tribes have a federal reserved right to groundwater. The Montana cases held that there is a difference between state appropriative rights and federal reserved rights because federal reserved rights are governed by federal law, and are established by references to the purposes of a reservation.

In *Gila River III*, unlike Big Horn, there has been no adjudication of any federal reservation's reserved water right, Indian or otherwise. The argument by Phelps Dodge that since the decision in the Wyoming state court decision was interlocutory, but treated as a final judgment that this Court should also treat *Gila River III* as a final judgment, is flawed.

In the present context of the Arizona adjudications, it appears that the first Indian water rights to be adjudicated will be those of the Gila River Reservation in Contested Case W1-203. The Special Master in the Gila River adjudication has set the briefing schedule to begin adjudicating the federal reserved water rights of the Gila River Indian Community. *See* Contested Case No W1-203, "*In re the Water Rights of the Gila River Indian Community*."

As with the Wind River Indian Reservation in the Wyoming, Issue 4, and all other dependent and related federal questions relating to whether the Gila River Indian Reservation has a reserved water right to groundwater, will be adjudicated in W1-203. If the Arizona Supreme Court then reviews the trial court judgment, and issues a decision, this Court might then have appellate jurisdiction to review Issue 4 as a final judgment under 28 U.S.C. § 1257(a).

CONCLUSION

These Petitioners initiated the Arizona adjudications. They wrote the statues and represented to the Court, the Arizona Supreme Court and these Respondents that the Arizona adjudication would be comprehensive. In San Carlos the same Petitioners told the Court:

> There is little dispute over the comprehensiveness of Arizona's statutory procedure for the general adjudication of conflicting claims to water. (fn omitted) Under that procedure, each owner of land in the watershed under adjudication is identified and personally served with process, and each water right is determined in a decree binding on all water claimants within the watershed — which, of course, is precisely the procedure required by the McCarran.

Petitioners' Reply Brief in No. 81-2147, p. 10. They should not now be heard to say that they did not mean groundwater necessary to the purposes of a federal reservation, or that it is too burdensome on state claimants to participate. It is burdensome on the Tribes . The Apache Tribes urged the Court to protect them from the State proceedings in *San Carlos.*

The Supreme Court of Arizona addressed these concerns of Petitions in *Gila River III.* It correctly determined that "for federal law, the question is one of hydrology, not compartmentalization." *Id.* at 751. It found that "the overarching purpose of the general stream adjudication statute is to provide the finality and certainty that can only be achieved through determination of all claims to water within the basin." *Id.* at 751.

Petitioners should not now be heard to say that although they knew that they could not defeat the federal purposes of an Indian reservation by surface diversions under *Winters*, they nevertheless could do it with their pumps.

The Arizona Supreme Court reminded these Petitioners that "there long has loomed the need — sometimes noted, sometimes wished away — for those same interests also to accommodate

themselves to the water claims of the vast federal land holdings that surround them." *See Gila River I*, 697 P.2d at 663. *Gila River III* at 750.

These Petitioners must abide by the proceedings they initiated. Although burdensome for all, at this point "the best way out is always through." *Gila River III* at 750.

The Court should deny the certiorari petitions because the *Gila River III* decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a); and because the decision is abstract in nature not warranting review at this time.

Respectfully submitted,

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